UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/539,149	01/13/2006	Josephus Henricus De Laat	F7692(V)	2739

201 7590 05/08/2009

UNILEVER PATENT GROUP
800 SYLVAN AVENUE
AG West S. Wing
ENGLEWOOD CLIFFS, NJ 07632-3100

EXAMINER	
CHAWLA, JYOTI	
ART UNIT	PAPER NUMBER
1794	
MAIL DATE	DELIVERY MODE
05/08/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/539,149	DE LAAT ET AL.	
	Examiner	Art Unit	
	JYOTI CHAWLA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *30 January 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-10* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-10* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Applicant's submission filed on 1/30/2009 has been entered as compliant. Claims 1 and 4 have been amended and claims 9 and 10 are added to the current application. Claims 1-10 are pending and examined in the current application.

Claim Objections

Objection to claims1-8 made in the previous office action dated 10/30/08 have been withdrawn based on applicant's amendments.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
Rejection to claim 4 made in the previous office action dated 10/30/08 under 35 U.S.C. 112, second paragraph, as being indefinite for broad range or limitation together with a narrow range or limitation has been withdrawn based on applicant's amendments.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

(A) Claim 1-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reckweg (WO 97/08956), in view of Merchant et al (US 6287625 B1), hereinafter Merchant.
References and rejections are incorporated herein and as cited in the office action dated 10/30/08.

Claims 1 and 4 have been amended in response to claim objections and claim rejections under 112 (second paragraph) and the amendments do not add any new limitations to claims 1-8, which remain rejected for reasons of record.

Rejection of newly added claims 9-10:

Reckweg teaches of acidic water continuous product (Page 3, lines 6-10). Reckweg is silent regarding the specific amount of food grade acid and also regarding the addition of acetic acid but Reckweg teaches the acidity level, along with protein and fat level as recited in the composition. Acidification of water continuous products using acetic acid (vinegar) either alone or in combination with other food acids like citric acid and lactic acid was known in the art at the time of the invention. Merchant teaches of spreads and dressings comprising starch, vegetable oils, egg products, sweeteners and edible acids (Column 7, line 35 to line 60). The products of Merchant have a pH range of 3-5 (column 10, line 3 and Examples), which falls within applicant's recited range. Regarding the relative amount of acetic acid in claim 9, both Reckweg and Merchant teach pH or acidity level in the recited range of the applicant. Thus, the total acid is in applicant's recited range in water continuous product was known. Further, regarding the edible acids or food grade acids, Merchant teaches that vinegar (i.e., acetic acid), lime juice (comprising citric acid), acetic acid, lactic acid, citric acid and any combination of the edible acids. Thus, applicant's recited acids were also known to be used in water continuous products. Regarding the relative ratios of the acids it would have been a matter of routine optimization experiment and thus would have been obvious to one of ordinary skill in art to use or combine Reckweg and Merchant in the range as claimed, because it has been held that where the general conditions of the claims are disclosed in the prior art, it is not inventive to discover the optimum or workable range by routine experimentation. See MPEP 2144.05.
Further, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case. At page 234, the Court stated as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Regarding newly added claim 10, which depends from claim 4, Reckweg teaches a water continuous (page 2, line 2), acidified product having a pH from 4.0 to 5.2 (Page 5, lines 13-14) which falls in applicants' recited range of 3.8 to 5.2 (claim 4) and includes applicants' recited range of 4.2 to 4.9 (claim 10).Thus, claim 10 is rejected for the same reasons as already on record for rejection of claim 4 over Reckweg.

Response to Arguments

Applicant's arguments filed 1/30/2009 have been fully considered but they are not persuasive.

On page 5, lines 7-11, applicant alleges that Reckweg's product is not a "chemically acidified" water continuous product. Applicant appears to draw this conclusion because "at page 5, lines 1-3, Reckweg teaches products which are acidified by fermentation by lactic acid producing cultures". This argument is not persuasive. First of all, applicant's claim is not directed to a specific method of acidification. Given that lactic acid is a chemical, irrespective of how it is produced, Reckweg's product is chemically acidified.

It is noted that if applicant intends to recite a specific process of acidification, such a recitation will make the claim a product by process claim. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted)

On pages 5-6 of applicant's response, applicant argues that Reckweg does not teach the product claimed but does not specify what claim the argument pertains to. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., "provide chemically acidified products that are microbiologically stable on storage", emphasis added; see page 5, fifth paragraph of applicant's response) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

On page 9, last two paragraphs, applicant argues that the Office points to no teaching by "Reckweg of the use of a combination of food grade acids with a small amount of acetic acid" (see page 5, 2nd last paragraph). In response to applicants' above argument against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As noted in the rejection of claim 6, Reckweg reference is not being relied upon for the teaching of the specific amount or type of food grade acid (or acetic acid) – this teaching is from Merchant reference.

On page 9, last paragraph, applicant alleges that Merchant does not teach "water continuous products…..", but does not present specific arguments as to why the parts of Merchant quoted and explained in the rejection of claims 1, 2, 3, 6 and 8 (such as Merchant, Column 7, line 35 to line 60; and Column 10, line 3 and examples) do not teach what is stated in the rejection. Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/JC/
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794